U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

September 6, 2016

BY ECF

The Honorable P. Kevin Castel
United States District Judge
Daniel Patrick Moynihan Federal Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: United States v. Gary Hirst,
15 Cr. 643 (PKC)

Dear Judge Castel:

The Government writes for two purposes. First, the Government writes to advise the Court that defendant Gary Hirst has provided notice that he intends to call a witness to offer opinions on whether certain actions taken by officers and directors of Gerova Financial Group Ltd. ("Gerova") complied with Cayman Island law. The Government believes that such notice is deficient because it fails to set forth the bases on which Hirst's expert has drawn this conclusion and therefore does not properly comply with the disclosure requirements for expert witnesses. Further, the Government believes, in accordance with Fed. R. Crim. P. 26.1, that such testimony is not properly put before the jury because questions of foreign law are legal issues for the Court to determine, not factual determinations for the jury to make. Second, the Government seeks to preclude Hirst from calling two FBI Agents – Special Agents Steven Wu and Eugene Goldman – to testify about statements made to them by Hirst.

Hirst's Expert Notice is Deficient

On August 23, 2016, Hirst provided the Government notice that he intends to call Jan Golaszewski, Esq. of Carey Olsen Cayman Limited as a witness at trial. Hirst's notice as to Golaszewski read, in full, that Golaszewski would testify "regarding the law of the Cayman Islands as it relates to Gerova's Articles of Association and corporate governance." The Government advised Hirst that it believed this notice was deficient under Fed. R. Crim. P. 16(b)(1)(C)(i) because it did not "describe the witness's opinions, [and] the bases and reasons for those opinions" as required by that Rule.

On September 2, 2016, Hirst supplemented his initial disclosure. His amended disclosure as to Golaszewski read, in full:

> [Golaszewski] will testify concerning the law of the Cayman Islands as it relates to Gerova's Articles of Association, the constitution and operation of Gerova's Board of Directors, the interpretation of various Gerova board resolutions, the interpretation of the contract governing the relationship between Gerova and its transfer agent, and the interpretation of certain other Gerova agreements. In particular, we anticipate that Mr. Golaszewski will offer his opinion that under the board resolutions operative at the time and the law of the Cayman Islands as applied to these resolutions, Gerova's directors, and in particular Mr. Hirst, were legally authorized to execute documents such as the Ymer Shahini warrant agreement and to instruct CST to issue shares on behalf of the company without prior board approval.

Hirst's disclosure continues to be deficient, as it does not properly set forth the bases for Golaszewski's opinion that the actions of Gerova's directors complied with Cayman Islands law. The disclosure does not, for example, set forth the specific provisions of Cayman law purportedly at issue or the specific provisions of Gerova's board resolutions and other governing documents that purportedly authorized the actions of Gerova's agents, including Gary Hirst. As such, these disclosures are insufficient. *See, e.g.*, *United States* v. *Jasper*, No. 00 Cr. 825 (PKL), 2003 WL 223212, at *3 (S.D.N.Y. Jan. 31, 2003) ("However, the Advisory Committee emphasized that the most important aspect of this mutual discovery obligation is the provision of a summary of the bases of the expert's opinion. Therefore, the summary required pursuant to Rule 16(a)(1)(G) and Rule 16(b)(1)(C) should cover 'not only written and oral reports, tests, reports and investigations, but any information that might be recognized as a legitimate basis for an opinion under Federal Rule of Evidence 703, including opinions of other experts.'") (citing Advisory Committee Notes to 1993 Amendment to Fed. R. Crim. P. 16). Without proper disclosure of the bases for Golaszewski's testimony, the Government cannot appropriately determine whether to challenge the reliability of Golaszewski's opinions under *Daubert* or, in any event, how to prepare to cross-examine Golaszewski. Without supplementation of Hirst's disclosures to include the bases for Golaszewski's opinions, the Court should preclude Golaszewski's testimony.

Further, Hirst's intention to call Golaszewski as a witness at trial runs afoul of Fed. R. Crim. P. 26.1. That rule requires that when a party intends to raise an issue of foreign law, it must provide written notice to both the Court and the opposing party. Hirst has not to date provided notice to the Court of its intention to raise a foreign law issue and thus has not fully complied with Fed. R. Crim. P. 26.1. Additionally, Fed. R. Crim. P. 26.1 provides that issues of foreign law "are questions of law" and in deciding such issues "a court may consider any relevant material or source—including testimony—without regard to the Federal Rules of Evidence." Because foreign law issues are "questions of law," they are not properly the subject of a jury's consideration. *See, e.g.*, *United States* v. *Kozeny*, 582 F. Supp. 2d 535, 537 (S.D.N.Y. 2008) (referencing a hearing conducted by the Court in which competing experts testified and after which the Court made a determination as to the requirements of another country's law). To the extent Golaszewski will opine about "the law of the Cayman Islands" as well as whether the conduct of certain of Gerova's officers' complied with that law, the requirements of Cayman law are an issue for the Court to resolve in the first instance, outside the presence of the jury, and are not properly the subject of testimony before the jury. The Government therefore respectfully requests that the Court preclude Golaszewski's testimony, unless the defense complies with Fed. R. Crim. P. 26.1 and provides the Court and the Government with sufficient information such that the Court can rule on the legal issue presented. Such a determination may require testimony by Golaszewski at a pretrial hearing.

The Testimony of Agents Wu and Goldman Should be Precluded

On or about October 31, 2013, Hirst was interviewed by FBI Special Agents Wu and Goldman. The official FBI memorialization of that interview indicates that Hirst had provided the FBI with a written summary of his interactions with an individual named David Bergstein both during the time period when Hirst was the President and Chairman of Gerova and thereafter. The memorialization does not indicate whether Hirst sought the interview with the FBI or whether the FBI initially approached Hirst. Both agents have indicated to the Government that they do not recall whether Hirst or the FBI initiated the interview. Hirst has provided notice under the applicable *Touhy* regulations that he intends to call Agents Wu and Goldman as witnesses at the upcoming trial.

The Court should preclude the testimony of Agents Wu and Goldman. Hirst cannot introduce, through the agents, the content of his statements to the FBI, as such testimony would be inadmissible hearsay. *See* Fed. R. Evid. 802. Hirst has not, to date, articulated either a non-hearsay basis for the admission of the content of his statements or a hearsay exception that would allow its admission. To the extent that Hirst seeks to introduce not the content of his statements, but the mere fact that he made a statement to the FBI, that fact is irrelevant and should be precluded under Fed. R. Evid. 401. The fact that Hirst spoke to FBI agents some three years after the conduct at issue in the upcoming trial has no bearing on whether he had the requisite criminal intent to commit the crimes charged in the indictment in this matter.

Respectfully submitted,

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